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U.S. Environmental Protection Agency
EPA Docket Center
1301 Constitutional Ave, N.W.
EPA West
Suite B102
Washington, DC 20460

Gentlemen:

**RE: Docket ID No. Ow-2002-0068: FRL- 7897-2**

The following comments respond to the EPA request for input regarding "specific issues associated with the development of regulations for storm water discharges from oil and gas construction activities" dated 11 April 2005 at 70 FR 18347.

Holliday Environmental Services, Inc. is an environmental and regulatory engineering organization serving numerous independent E&P operators over the last 18 years. We are providing these comments based on our experience with assessing and attempting to implement regulations in the oil and gas industry.

**Comment/Recommendation**

EPA should not apply the NPDES Storm Water General Permit to Oil and Gas drill site construction activities. To do so would: **1)** be contrary to the plain language of the regulations (40 CFR §122.26(c)(iii), **2)** be contrary to Congressional intent to exempt oil and gas exploration and production operations (which include the construction of the access road and rig or well pad, etc), **3)** be contrary to the founding precepts of the Clean Water Act (CWA), which exclude from regulation storm water as reaffirmed by the House of Representatives 108$^{th}$ H.R. 6, **4)** impose significant and overly burdensome economic constraints on small operators, who compose the majority of the independent domestic oil and gas producers and who drill 90 percent of the U.S. wells, **5)** be unnecessary since the industry has established internal standards and has voluntarily implemented these measures and lastly **6)** be improper and subject to legal challenge since EPA has not followed proper rulemaking procedures.

**Supporting Information**

1. As codified, the Clean Water Act at 33 U.S.C.§ 1342 (l)(2) and 40 CFR §122.26 (c)(iii) explicitly exempt operators of new or existing oil and gas exploration or production from the storm water permitting process.

40 CFR §122.26 (c)(iii), states:

> "The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section…"

EPA does not have jurisdiction or authority to apply a regulation in a manner that is contrary to the plain language of the regulation and to do so is overreaching by the EPA.

2. To apply the storm water permit requirements to oil and gas operations (including construction activities) is contrary to Congressional intent to exclude this industry (H.R. 6). To defy the plain language of the regulation, EPA must show clear legislative intent to regulate the oil and gas industry under this provision and no such evidence exists. If the intent of the regulation were to include within the scope of the regulation, the construction phase of oil and gas operations, Congress would have articulated that intent and the regulation would have reflected that intent. Construction activities are integral to and inherent in the definition of the term "operation" or "facility." Oil and gas exploration or production cannot occur without the initial construction of the site facilities (including clearing, grading, well pad construction, etc.). These activities are integral and implicit in the term exploration and production.

3. Any storm water flows exhibited at typical oil and gas exploration or production sites are in the form of sheet flows, which are excluded from the permit provisions of the NPDES storm water permit. Drill sites by nature are flat areas having a reserve pit and/or water storage pit. Good housing keeping dictates sloping the rig drainage to the reserve pit. Similarly, the drill site is surrounded by a ring levee, which typically drains to a water storage pit and/or reserve pit. This water storage pit is necessary, as a reservoir for non-potable rig water

4. The oil and gas industry already has implemented numerous self-regulating standards e.g., ring levees; barrow ditches; sediment barriers, making the regulation of storm water from these facilities unnecessary. Currently, most operators drain storm water from drill sites to the water storage pit or reserve pit. In addition to collecting storm water in pits, the industry voluntarily installs "ring levees" around drill sites, eliminating runoff or channeled flow from drill sites. Typically, construction impacts defined by the ring levees are less than one acre. The drill site drains to the reserve pit or water storage pit. The resulting liquids diverted to the reserve pit are either injected or hauled offsite by vacuum truck. The storm water collected in the water storage pit is used for rig operations. There may be "burrow ditches" along the road, but seldom does a road occupy

an acre. If the road does exceed 1 acre, the use of sediment traps solve the problem. Accordingly, all provision of 40 CFR 122.26(c)(iii) and 33 U.S.C. §1342(l)(2) are satisfied.

5. Proper rule making and administrative law procedures require that EPA conduct an evaluation of the economic impacts of any new rule. As best we can determine, EPA has not conducted this essential analysis. See EPA Docket No. OW-2002-0068-0166 for details. If EPA had performed the required economic analysis, they likely would have concluded the costs associated with the implementation of the Storm Water Permit rule are staggering and significant as defined by Executive Order 12866. The Department of Energy/Office of Fossil Energy ("DOE") arrived at that conclusion after commissioning an Economic Impact Analysis, published 7 December 2004, entitled "Estimated Economic Impacts of proposed Storm Water Discharge Requirements on the Oil and Gas Industry (Final)" prepared by Advanced Resources International, Inc. This analysis concentrated on the economic impact of the Storm Water Construction Permit on the Oil and Gas Extraction Industry.

In light of this DOE finding and assuming EPA conducts the required economic analysis, EPA is obligated to explain any differences between the DOE and EPA study findings. However, EPA does not conduct a study and as such would then need to conduct the economic study to justify its position. or b) accept the DOE study – which basically concludes that the rules are too much of an economic burden on the oil and gas extraction industry. Specifically, EPA should evaluate the cost of the Storm Water Pollution Prevention Plan (SWPPP). Major oil and gas operators are reporting SWPPP costs ranging from $6,000 to $12,000 per plan, with smaller operators reporting the average cost running about $3,000 per site. Even this cost is a substantial expenditure for small independent operators, who drill most of the shallow wells.

In addition, EPA must factor into the economic analysis the delays resulting from waiting until EPA approves the Notice of Intent (NOI), which must be approved in Washington, DC for many active oil and gas producing states, e.g. Texas.

Furthermore, while the DOE found that the costs would be staggering and significant; its analysis was conservative in that it did not consider the economic impact of dry holes (wells, which do not produce hydrocarbons in commercial quantities). **Nine out of 10 drilled exploratory wells are dry holes and are plugged and abandoned; however, under the rules as proposed they would all need an SWPPP.**

6. We also find EPA failed to consider in its rule making process, previous positions taken with regard to the regulation of oil and gas exploration and production operations under the Clean Water Act storm water provisions.

In an *internal* memorandum dated 10 December 1982 Ephraim King, Chief NPDES Program Branch (EN-336), advised Vern Berry (Region VIII, 8 WM-C) an NPDES permit is required for "storm water discharges from construction activities involving oil and gas facilities…" This memorandum was at the heart of the suit regarding Storm Water Permit requirements for oil and gas drill sites. (Appalachian Energy Group v. EPA, No 93-2146). No decision regarding the validity of the EPA Storm Water 10 December 1982 claim resulted, since the Fourth Circuit Court of Appeals dismissed the suit because of lack of jurisdiction.

Some time after the 1982 King memorandum, EPA, in an undistributed, undated interpretation without letterhead, written by Diane C. Regas, Acting Assistant Administrator for an unstated part of EPA, and which interpretation cannot be located in EPA Docket OW-2002-0055 (Final General NPDES Permit for Storm Water Discharges from construction activities). The memorandum states:

> The Agency does not interpret the statutory exclusion for "oil and gas exploration, production, processing, or treatment operations or transmission facilities" to refer to the clearing, grading, and excavation of land surfaces, i.e., construction, that precedes such operational activities. Therefore, the statutory references to uncontaminated and non-contact runoff do not constrain EPA's interpretation. The type of construction activities which typically precede oil and gas operations, as identified in the fact sheet for 1995 NPDES general permit for storm water discharges associated with industrial activity, are construction of access roads, drill pads, reserve pits, personnel quarters and surface impoundments. 60 Fed Reg at 50915. Similarly, an industry publication, A Primer of Oilwell Drilling (4th ed., 1979), under the section "Preparing the Site," explains that, "[for] an ordinary land location, the site is cleared and leveled, and access roads and a turnaround are built." These construction industrial activities are fundamentally dissimilar, with different associated pollutants, from the non-construction industrial activities specified in the fact sheet for the general permit, i.e., well drilling, well completion/stimulation, production, equipment cleaning and repairing, and site closures. 60 Fed. Reg. at 50915. Only when storm water discharges from these latter activities are not contaminated by or byproduct, or waste products, does the permit moratorium in section 402(l)(2) apply

Apparently, other functions of the federal government disagree with the EPA interpretation that "oil and gas operations" do not include construction of the drill site. The department of Labor, Bureau of Labor Statistics official position on SIC 13XX (found at www.bls.gav/oes/2000/oesi2_13.htm) states "SOC [Standard

Occupational Classification] Major Groups in SIC 13 – Oil and Gas Extraction [include] Construction and Extraction Occupations." This clear statement by the Department of Labor demonstrates "construction and extraction" are integral parts of Oil and Gas Extraction SIC 13XX. Also, the clear statement by the Department of Labor of the integral connection of construction to petroleum extraction raises serious accuracy questions regarding the King and Regas interpretations.

Interestingly, EPA (1999) EPA dismisses the concern regarding the oil and gas drill site construction exemption at page 4-2, footnote 2 by saying;

> Based on public comments received on the proposed rule, EPA considered including oil and gas exploration sites but upon further review, "*Determined that few, if any sites, actually disturb more than one acre.*" (Emphasis added)

If the EPA has included such considerations in their deliberations, then it appears as though EPA has failed to make these considerations public, possibly representing another example of what the Fourth Circuit Court call "internal" thinking not released to the public.

Respectively, submitted,

s/ G.H. Holliday
G.H. Holliday, Ph,D., P.E., DEE
President

**References**

Appalachian Energy Group v. EPA. U.S. Fourth Circuit Court of Applies 93-2146

EPA, 1999. "Economic Analysis of the Final Phase II Storm Water Rule, Final Report." EPA Contract No. 68-C4-0034, October.